UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TREVOR DUANE ROSE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case No. C05-0089-TSZ-JPD REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is a federal prisoner who has filed a motion under 28 U.S.C. § 2255 that seeks to vacate, set aside, or correct his 2004 federal court sentence. Respondent has filed a response opposing petitioner's motion. Following a careful review of the parties' pleadings and the record, this Court concludes that petitioner's § 2255 motion should be denied.

FACTS

On June 23, 2003, petitioner Trevor Duane Rose attempted to enter the United States from British Columbia, Canada in his Toyota Avalon. Case No.03-cr-00287, Dkt. No.19. Customs officials stopped petitioner at the border and a search of his vehicle revealed a hidden compartment that contained over 40,000 methylenedioxyamphetamine (commonly known as "MDMA" or "ecstacy") tablets. The street value of the ecstacy was later estimated to be worth over $800,000. Dkt. No.19. Agents allowed petitioner to cross into the United States, where they followed him for several hours before pulling him over and arresting him. Upon

arrest, petitioner admitted he was transporting ecstacy. Dkt. Nos. 15, 19. On September 30, 2003, petitioner pleaded guilty to one count of importation of ecstasy. Dkt. Nos. 15, 19.

On January 16, 2004, the Honorable Thomas S. Zilly sentenced petitioner to seventy months in custody. Dkt. Nos. 29, 30. Petitioner requested a reduced sentence under the United States Sentencing Guidelines arguing, *inter alia*, that he played only a minor role in the importation and that he did not know the quantity of drugs that he was transporting. Dkt. No. 26.

Petitioner did not file a direct appeal. Instead, he seeks relief from his sentence by filing this § 2255 motion.

CLAIMS FOR RELEASE

Petitioner's motion relies upon the consolidated case of *United States v. Booker*, 125 S. Ct. 738 (2004), to argue that his sentence would have been shorter had the Court properly applied the United States Sentencing Guidelines (the "Guidelines") in an advisory fashion, rather than as mandatory rules. Case No. 05-00089, Dkt. Nos. 1, 3, 10. He identifies at least five factors that he argues would have resulted in a shorter sentence, had the Court not considered the Guidelines mandatory. Additionally, petitioner argues that *Booker* applies retroactively to his case now final and before the Court on collateral review. Dkt. No. 1, 3, 10.

In its response to petitioner's motion, respondent argues that the motion should be denied because *Booker* does not apply retroactively to cases on collateral review. Dkt. No. 8. Respondent further argues that, even if *Booker* does apply retroactively, it would not benefit petitioner because he defaulted on his claims by failing to first raise them with the Court at the time of sentencing. Dkt. No. 8. Finally, respondent argues that petitioner's arguments lack merit because the Court actually considered them at the time of sentencing and rejected them. Dkt. No. 8.

DISCUSSION

A. Petitioner's "Non-Constitutional Booker Error" Is Not Cognizable In a § 2255 Motion

In *United States v. Booker*, the Supreme Court reaffirmed its holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 125 S. Ct. at 756. The Court then applied this rule to the Guidelines, and held that they violated the Sixth Amendment when applied in a mandatory fashion. The Court, however, saved the Guidelines by severing the provisions that made them mandatory. *Booker*, 125 S. Ct. at 764. Sentencing courts are still required to consider the Guidelines when determining sentences, but are not required to impose the sentence mandated by the Guidelines' applicable range. *Id.* at 764-65.

Booker therefore gives rise to at least two distinct types of error that a sentencing court can commit. First, a court can commit "constitutional *Booker* error" by relying on judge-found facts, other than admissions or the fact of prior convictions, to mandatorily enhance a defendant's sentence. *U.S. v. Gonzalez-Huerta*, 403 F.3d 727, 731-32 (10th Cir. 2005). A court which sentenced a defendant in this manner would violate the Sixth Amendment as it was construed in *Booker*.

Alternatively, it is possible that a court could commit a "non-constitutional *Booker* error" by applying the Guidelines in a mandatory manner. *Gonzalez-Huerta*, 403 F.3d at 731-32. This type of error could occur because *Booker* severed the portion of the Guidelines that made them mandatory. *Id.* at 732. The Ninth Circuit, however, has "consistently held that a § 2255 petitioner cannot challenge non-constitutional sentencing errors if such errors were not challenged in an earlier proceeding." *U.S. v. McMullen*, 98 F.3d 1155, 1157 (9th Cir. 1996) (citing *U.S. v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995) (recognizing that certain errors

that were undiscoverable at sentencing may be cognizable in § 2255 motions);[1] *U.S. v. Keller*, 902 F.2d 1391, 1393 (9th Cir. 1990)).

Here, petitioner's claims are properly classified as a "non-constitutional *Booker* error." The record demonstrates that the Court relied entirely on the facts admitted by petitioner in his plea agreement to establish his sentencing range of 70 to 87 months. *See*, Case No. 03-cr-00287, Dkt. Nos. 19, 29. Indeed, petitioner does not argue that his sentence was enhanced by factors not admitted by him or proven to a jury. Case No. 05-00089, Dkt. Nos. 1, 3, 10. He simply claims that he might have received a lower sentence if the Court did not believe the Guidelines were mandatory. Moreover, the Court considered evidence regarding petitioner's assistance to the government, the extent of his involvement in his crime, whether he was a continuing threat to the public, and other mitigating factors. Considering this range of factors, the Court sentenced petitioner to seventy months – the low end of the sentencing range. Case No. 03-cr-00287, Dkt. Nos. 24, 29. Because petitioner raises "non-constitutional *Booker* errors" that turn on whether the Court properly determined his sentence, his arguments are not cognizable in his § 2255 motion.

Even if this Court were to hold that a § 2255 motion was a suitable vehicle for raising a "non-constitutional *Booker* error" petitioner's argument would still fail. His argument necessarily turns on whether *Booker* applies retroactively to his case now on collateral review. This Court, however, concludes that it does not.

B. *Booker* Does Not Apply Retroactively to Cases on Collateral Review

Generally, decisions that establish new rules of law are not applied retroactively to

[1]Even if petitioner did argue that he could not have discovered this error at sentencing, which he has not, it is extremely unlikely that he would prevail. *Apprendi v. New Jersey*, which *Booker* heavily relied upon, was decided well before petitioner was convicted.

cases on collateral review.[2] *Teague v. Lane*, 489 U.S. 288, 303, 310-11 (1989).[3] There are, however, two exceptions to this rule. To determine whether new rules should be retroactively applied, the Court must undertake a three step analysis. First, it must determine when the defendant's conviction became final. *Beard v. Banks*, 124 S. Ct. 2504, 2510-13 (2004). Then, it must decide whether the rule in question is a "new" rule. *Id*. Finally, if the rule is new, the Court must determine whether it satisfies one of the two narrow exceptions to non-retroactivity. *Id*. If the rule is substantive it should be applied retroactively. *Schriro v. Summerlin,* 124 S. Ct. 2519, 2522-23, and n.4 (2004). Additionally, certain procedural rules may be applied retroactively it they constitute one of a very "small set of 'watershed rules of criminal procedure' [that implicate] the fundamental fairness and accuracy of the criminal proceeding." *Id*. at 2523 (internal citations omitted).

Here, petitioner has failed to show that the rule announced in *Booker* should be applied retroactively to cases on collateral review.

1. Petitioner's Case Was Final Before *Booker* Was Issued

A conviction typically becomes final for purposes of federal habeas review when the Supreme Court denies the petition for certiorari or the time for filing such a petition has elapsed. *United States v. Garcia*, 210 F.3d 1058, 1059 (9th Cir. 2000) (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987)). A defendant's conviction also becomes final when the time for appealing his sentence has passed. *See United States v. Calvin*, 204 F.3d 1221, 1225 (9th Cir. 2000).

Here, the district court issued its final judgment on January 16, 2004. Case No. 03-cr-

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[2]Such rules, however, are generally applied to cases still pending on direct appeal. *Griffith v. Kentucky*, 279 U.S. 314, 328 (1987); *see also U.S. v. Ameline*, 409 F.3d 1073 (2005) (en banc) (requiring limited remand for cases raising *Booker* claims on direct review).

[3]Although *Teague* was a four justice plurality opinion, it is now "accorded the full precedential weight of a majority opinion." *Jones v. Smith,* 231 F.3d 1227, 1236 n.5 (9th Cir. 2000) (internal citations omitted).

00287, Dkt. No. 30. Petitioner had ten days by which to file an appeal, but he did not. *See* Fed. R. App. P. 4(b)(1)(A). Petitioner's conviction therefore became final almost a year before the Supreme Court announced its decision in *Booker* on January 12, 2005. Because petitioner's case became final prior to *Booker*, for purposes of retroactivity analysis, the Court must determine whether *Booker* announced a "new" rule.

2. *Booker* Announces a New Rule

Generally, decisions that establish "new" rules of law are not applied retroactively to cases on collateral review. *Teague*, 489 U.S. at 303, 310-11. A court announces a new rule for purposes of retroactivity when it "breaks new ground or imposes a new obligation on the States or Federal Government." *Teague*, 489 U.S. at 301 (internal citations omitted). Stated differently, a rule is new if its result "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id*. (emphasis in original); *accord Bockting v. Bayer*, 399 F.3d 1010, 1014-15 (9th Cir. 2005). To be new, the unlawfulness of the conviction in question must have been "apparent to all reasonable jurists." *Beard*, 124 S. Ct. at 2511 (internal citations omitted).

Here, *Booker* must be said to have announced a new rule for purposes of retroactivity analysis. In *Booker*, the Court noted that it "must apply today's holdings . . . to all cases on direct review." *Booker*, 125 S. Ct. at 769 (internal citations omitted). Such language would have been superfluous were the rule dictated by precedent. Moreover, as the Sixth Circuit noted in *Humphress v. U. S.*, 398 F.3d 855, 861-62 (6th Cir. 2005) (collecting cases), the federal judiciary was deeply divided over the effect of *Blakely* on the Guidelines. The fact that four Supreme Court justices dissented in *Booker* lends further support to this argument. With such widespread disagreement by "reasonable jurists" throughout the judiciary as to the effect of *Blakely*, it can hardly be said that the rule in *Booker* was "dictated" by then-existing case law before it was announced. *Booker* thus constitutes a "new rule" for purposes of retroactivity analysis.

3. *Booker* Announced a Procedural Rule, Not a Substantive Rule

Substantive rules are defined as those that "narrow the scope of a criminal statute by interpreting its terms [or that make] . . . constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Summerlin*, 124 S. Ct. at 2522 (internal citations omitted); *see also Bockting*, 399 F.3d at 1016. Substantive rules can also be said to "alter[ ] the range of conduct or the class or persons that the law punishes." *Summerlin*, 124 S. Ct. at 2523. They also modify the elements of a crime. *Id.* at 2524. Substantive rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id*. at 2522-23 (internal citations and quotations omitted).

Conversely, rules that "regulate only the *manner of determining* the defendant's culpability are procedural." *Id.* at 2523 (emphasis in original). According to the Supreme Court, rules that allocate decision making authority between judge and jury for purposes of the Sixth Amendment are "prototypical procedural rules." *Id*. Unlike their substantive counterparts, new procedural rules are generally not applied retroactively because they "merely raise the possibility" that someone convicted of a crime might have otherwise been acquitted. *Id*. at 2523.

Summerlin makes clear that *Booker*, which impacts the allocation of decisionmaking authority for Sixth Amendment purposes, is a procedural rule. *Summerlin* addressed the question of whether *Ring v. Arizona*, 536 U.S. 584 (2002), should be applied retroactively to cases on collateral review, and concluded that it should not. In *Ring*, the Supreme Court held that an Arizona sentencing scheme that enabled a judge – not a jury – to determine sentencing factors for capital cases by a preponderance of the evidence violated the Sixth Amendment. *Ring*, 536 U.S. at 603-09. Because *Ring* only addressed the constitutionality of the law in the context of a direct appeal, its application to a collateral habeas corpus attack remained to be

determined.

To determine whether *Ring* should apply retroactively, *Summerlin* applied *Teague's* retroactivity analysis and concluded that the holding was procedural in nature. Specifically, the Court found that *Ring's* requirement that juries determine certain capital sentencing factors did not "alter the range of conduct Arizona law subjected to the death penalty." *Summerlin*, 124 S. Ct. at 2523. In fact, the Court reasoned that it was impossible for it to have done so because the decision "rested entirely on the Sixth Amendment's jury trial guarantee, *a provision that has nothing to do with the range of conduct a State may criminalize*." *Id.* (emphasis added). Instead, *Ring* merely affected the "range of permissible methods for determining whether a defendant's conduct is punishable[.]" *Id.* The Court then concluded that "[r]ules that allocate decisionmaking authority in this fashion are prototypical procedural rules[.]" *Id.*

The Ninth Circuit's analysis of whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies retroactively supports the conclusion that *Booker* announced a procedural rule as well. *Apprendi* held that "[o]ther than the fact of conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Applying *Teague*, the Ninth Circuit has held that *Apprendi* was a new rule of criminal procedure and that it was not retroactively applicable to cases on collateral review. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668-71 (9th Cir. 2002); *Jones v. Smith*, 231 F.3d 1227, 1236 (9th Cir. 2001). Since then, the court has also held that *Apprendi*, as extended in *Blakely*, does not apply retroactively to cases on collateral review, and that neither *Summerlin* nor *Blakely* undermines this non-retroactivity holding. *See Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1246 (9th Cir. 2005). The Ninth Circuit has also held that the Supreme Court "has not made *Blakely* retroactive to cases on collateral review." *Cook v. United States*, 386 F.3d 949 (9th Cir. 2004) (in the context of a second or successive § 2255 motion). Thus, both the Supreme Court and Ninth Circuit have

held that *Apprendi, Blakely* and related Sixth Amendment cases do not announce substantive rules because they relate to the allocation of decisionmaking during sentencing and not to the substantive nature of any underlying crime.

There is no meaningful distinction between the type of constitutional rule held not to apply retroactively in *Summerlin*, *Sanchez-Cervantes*, and *Cook*, and the type of constitutional rule announced in *Booker*. Like those cases, *Booker* is based upon the Sixth Amendment's requirement that certain sentencing factors be proven to a jury rather than to a judge. Indeed, like *Ring* and *Blakely*, *Booker* rests largely upon *Apprendi's* holding that the Sixth Amendment requires that "[o]ther than the fact of conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Like those cases, *Booker* has nothing to do with the range of conduct that the State can criminalize, nor the elements of any underlying criminal statute. Rather, *Booker* deals with the allocation of decisionmaking authority between judge and jury. Hence, like the decisions discussed above, the decision in *Booker* is a "prototypical procedural rule[]" that should not be applied retroactively to cases on collateral review.

Petitioner argues that *Booker* is a substantive rule because it concerns the Court's construction of a criminal statute and that such a construction necessarily applies from the date of the statute's enactment. Dkt. No. 10. He argues that the decision created a substantive rule because the Court's interpretation of the Guidelines effectively narrowed their scope. Petitioner therefore argues that *Teague* does not apply. Dkt. No. 10.

While petitioner is correct that *Teague* does not apply to substantive rules, his argument falls short because it assumes that *Booker* involves construction of a substantive criminal statute. It does not. As stated above, *Booker* addresses the manner in which sentencing factors are determined, not the scope or elements of any underlying substantive criminal statute. *Booker*, in fact, does not narrow the scope of the Guidelines. If anything, it

broadens them by rendering them advisory – an argument petitioner makes in his motion. Dkt. Nos. 1, 3, 10. Hence, contrary to petitioner's assertion, the fact that the Guidelines address sentencing, rather than elements of a crime, is relevant because the Guidelines do not alter the range of conduct or classes of persons punishable under the law. Instead, they merely impact how sentences are determined.

Petitioner also argues that *Booker* is substantive because it alters the range of conduct and classes of persons that the law punishes by taking away the Court's authority to mandatorily punish. Dkt. No. 10. He argues that persons and conduct necessarily punished before *Booker* may or may not be punished afterward. Dkt. No. 10.

Petitioner's argument, however, misconstrues the effect of *Booker*. First, it is not clear that sentences will in fact be different than they were when the Guidelines were mandatory. Moreover, while it is possible that sentencing determinations post-*Booker may* be different than their pre-*Booker* counterparts, the fact remains that a sentence will still be imposed. Petitioner concedes this. Dkt. No. 10. In other words, *Booker* impacts sentencing, not the elements or scope of any substantive crime. Only substantive rules can be said to define the latter.

Petitioner relies on *Lindsey v. Washington,* 301 U.S. 397 (1937), and *Miller v. Florida,* 482 U.S. 423 (1987), but these cases are distinguishable. *Lindsey* dealt with a challenge to Washington State's then-new indeterminate sentencing regime by arguing that it violated the Constitution's Ex Post Facto Clause. Similarly the issue in *Miller* was whether a sentencing regime that was revised after petitioner was convicted and used during his sentencing violated the Ex Post Facto Clause. Neither of these cases concern the retroactive application of new law in connection with a case on collateral habeas review.

Petitioner's reliance on *Bousely v. United States*, 523 U.S. 614 (1998), is also misplaced. *Bousely* related to the Court's construction of the specific terms of a federal statute that criminalized specific types of activity. It dealt with the Court's interpretation of the term

"use" as it related to the use of a firearm during the commission of certain drug crimes under 18 U.S.C. § 924(c)(1). In *Bousely*, the Court found that *Teague* did not apply because the case involved interpretation of a substantive criminal statute. *Id.* at 620. By interpreting the term "use," *Bousely* narrowed the scope of a criminal statute by interpreting its terms. This interpretation can also be said to have "altered the range of conduct[ ] . . . that the law punishes." As demonstrated above, however, *Booker* does neither. Petitioner's reliance on authority from other circuits is similarly flawed and is not controlling.

Finally, petitioner argues that *Booker* announced a substantive rule because it "altered the applicable maximum sentence" for any number of substantive crimes. Dkt. No. 10. Petitioner appears to argue that because the Guidelines are now advisory, the underlying criminal statute for each crime prescribes the maximum sentence. Dkt. No. 10. Again, petitioner's argument is misplaced because the Guidelines do not impact the scope of any statute's application.

For the reasons stated above, the new rule announced in *Booker* is procedural in nature. The Court must therefore determine whether the rule fits into the narrow exception to the general rule barring retroactive application of new procedural rules on collateral review.

4. *Booker* Does Not Constitute a "Watershed" Rule

Because procedural rules have a more attenuated link to the accuracy of a criminal conviction, only a limited number of "watershed rules of criminal procedure" that implicate the fundamental fairness and accuracy of the underlying criminal proceeding will be applied retroactively. *Summerlin*, 124 S. Ct. at 2523 (internal citations omitted). *Bockting*, 399 F.3d at 1016-17. To apply retroactively, a rule may not just be "fundamental" in an abstract sense, but instead must "alter our understanding of the *bedrock procedural elements* [essential to] . . . the fairness of a particular conviction. *Teague*, 489 U.S. at 311 (internal citations omitted; emphasis in *Teague*); *Summerlin,* 124 S. Ct. at 2523.

This class of procedural rules is so narrow that the Supreme Court indicated in 2004

that it is "unlikely" that one has yet to emerge. *Summerlin*, 124 S. Ct. at 2523. When explaining what types of procedural rules might constitute a watershed rule, the Supreme Court has referred to the right to counsel announced in *Gideon v. Wainright*, 372 U.S. 335 (1963). *Beard*, 124 S. Ct. at 2514 (internal citations omitted). The Ninth Circuit has held that the right to cross-examine witnesses who make certain hearsay statements, guaranteed by the Confrontation Clause, "joins the very limited company of *Gideon*." *Bockting*, 399 F.3d at 1019. In making this determination, the Ninth Circuit noted that the Supreme Court has described the right of confrontation as a "bedrock procedural guarantee" that "dates back to Roman times" and that its importance was recognized by the founding generation. *Bockting*, 399 F.3d at 1020 (quoting *Crawford v. Washington*, 541 U.S. 36 (2004). These limited cases underscore the extremely narrow scope of the "watershed" exception, and demonstrate that its application is reserved for only a very limited number of truly fundamental procedural rules.

Conversely, the Supreme Court has held that cases that affect the manner in which sentencing enhancements are determined do not constitute watershed rules that implicate the fundamental fairness of a conviction. *See*, *e.g.*, *Summerlin*, 124 S. Ct. at 2526. The Ninth Circuit has acknowledged this distinction as well. *Bockting*, 399 F.3d at 1016. In *Bockting*, the Ninth Circuit explicitly juxtaposed *Summerlin* and *Crawford* to demonstrate why only the latter constituted a procedural rule of watershed magnitude. *Id.* Specifically, the court explained that *Crawford*'s rule was "unequivocal[ly]" one that "seriously decreases the possibility of inaccurate conviction," whereas it was decidedly unclear whether the same was true of the rule in *Summerlin*. *Id.* at 1017.

Petitioner argues that *Blakely* and *Booker* are different than *Summerlin* because they concern the burden of proof, rather than just the reliability of the factfinder. Dkt. No. 10. Because the burden of proof has been recognized as a fundamentally important procedural rule and because *Booker* requires that sentencing factors be proven beyond a reasonable doubt, petitioner argues it should therefore qualify as a watershed rule and be applied retroactively.

Dkt. No. 10.

Given current precedent and the extremely narrow range of procedural rules that can be applied retroactively, however, *Booker* cannot be said to constitute a watershed rule. It is true that *Booker* did turn on the application of the proper burden of proof to determine sentencing factors. It is also true that the Supreme Court has recognized the burden as playing a "vital role" in ensuring the fairness of criminal proceedings. *See In re: Winship*, 397 U.S. 358, 363 (1970). Yet the Ninth Circuit has found that *Blakely* does apply retroactively to cases on collateral appeal. *Cook*, 386 F.3d at 950; *Cooper-Smith*, 397 F.3d 1245-46. Petitioner has not articulated how *Booker* differs from *Blakely*, nor identified any change in controlling authority that supports his argument for retroactive application. Given controlling authority in this Circuit, current precedent, and the extremely narrow range of procedural rules that can be applied retroactively, *Booker* cannot be said to constitute a watershed rule.

The district courts in the Ninth Circuit have so far reached similar conclusions. *See, e.g., U. S. v. Lopez -Cerda*, 2005 WL 1056658 (E.D. Wash. 2005); *Fain v. United States,* 2005 WL 1111235 (W.D. Wash. 2005); *U.S. v. Melton*, 2005 WL 1213666 (D. Alaska 2005) (Report and Recommendation); *U.S. v. Brown*, 2005 WL 1259889 (D. Alaska 2005) (Report and Recommendation); *but see U. S. v. Siegelbaum,* 359 F. Supp.2d 1104, 1108 (D. Or. 2005) (rejecting petitioner's § 2255 motion but recognizing that *Booker* and *Blakely* could be found to apply retroactively). Moreover, to the Court's knowledge, every Circuit Court to have considered whether *Booker* applies retroactively to cases on collateral review has determined that it does not. *See, e.g., U. S. v. Green*, 2005 WL 237204 (2d Cir. 2005); *Humphress*, 398 F.3d at 860; *McReynolds v. U. S.*, 397 F.3d 479, 481 (7th Cir. 2005); *U. S. v. Leonard*, 2005 WL 139183 (10th Cir. 2005). Until the Ninth Circuit determines otherwise, *Booker*, like *Apprendi* and *Blakely* before it, cannot be applied retroactively to cases on collateral review.

CONCLUSION

Petitioner's claim is not properly cognizable as a § 2255 motion because it raises "non-constitutional *Booker* errors." Moreover, even if a § 2255 motion is the proper vehicle for his claims, they must be dismissed because they rely upon *U.S. v. Booker*, which does not apply retroactively to § 2255 cases on initial collateral review. Petitioner's § 2255 motion must therefore be denied. A proposed order accompanies this Report and Recommendation.

DATED this 5th day of July, 2005.

James P. Donohue

JAMES P. DONOHUE
United States Magistrate Judge